

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

JOHN MICHAEL KELLY,)	
)	
Petitioner,)	
)	
v.)	Case No. CIV-12-1270-W
)	
)	
JANET DOWLING, Warden¹,)	
James Crabtree Corr. Ctr.)	
)	
Respondent.)	

REPORT AND RECOMMENDATION

Petitioner, a state prisoner appearing pro se, brings this action pursuant to 28 U.S.C. § 2254 seeking a writ of habeas corpus. United States District Judge Lee R. West has referred the matter to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B). Currently before the undersigned is Petitioner's motion to proceed *in forma pauperis*, **ECF No. 8**. For the following reasons, it is recommended that the motion be **DENIED**.

On February 25, 2013, the undersigned entered a Corrected Order to Petitioner to Cure Deficiencies, advising Petitioner that he had failed to submit a proper motion to proceed *in forma pauperis* and directing him to cure the deficiencies noted in the Order on or before March 11, 2012. On March 21, 2013 the Petitioner submitted a motion to proceed *in forma pauperis* and financial documentation, **ECF No. 8**. The Petitioner's

¹ If the Petitioner is currently in custody under a state court judgment, the petition must name as respondent the state officer who has custody. Rule 2(a), Rules Governing Section 2254 Cases in the United States District Courts.

offender statement report indicates \$58.98 available in the Petitioner's prisoner savings accounts. Oklahoma Department of Corrections Policy 120230.I.A.2 allows Mandatory Savings Account balances to be used to pay fees and/or court costs associated in filing a civil or criminal action. Accordingly, the undersigned finds that the motion should be denied.

It is therefore recommended that Petitioner's Motion to Proceed *In Forma Pauperis*, **ECF No. 8**, be **DENIED**. It is further recommended that this action be dismissed without prejudice unless Petitioner pays the full filing fee within twenty (20) days of any order adopting this Report and Recommendation. Petitioner is advised of his right to file an objection to this Report and Recommendation with the Clerk of Court by **April 15, 2013**, in accordance with 28 U.S.C. § 636 and Fed.R.Civ.P. 72. Petitioner is further advised that any failure to make timely objection to this Report and Recommendation waives the right to appellate review of the factual and legal issues addressed herein. *Moore v. United States*, 950 F.2d 656 (10th Cir. 1991).

The Court notes that Petitioner has filed a motion for an order staying this case, **ECF No. 6**, in which he acknowledges that he has not exhausted all of his state court remedies. As the case is at this point only conditionally filed, it would be inappropriate for the Court to rule on the motion at this time. However, Petitioner is advised that he may voluntarily dismiss his case without prejudice on or before **April 15, 2013**, should he wish to do so in order to meet the mandatory requirement that he completely exhaust his state court remedies before bringing an application for federal habeas corpus relief. If Petitioner voluntarily dismisses his action on or before **April 15, 2013**,

he will not incur any filing fee.

The Clerk is not to forward a copy of the petition to the appropriate state agency until further order of the Court. **This terminates the referral to the undersigned Magistrate Judge unless and until the matter is re-referred.**

ENTERED on March 28, 2013.



SHON T. ERWIN
UNITED STATES MAGISTRATE JUDGE